CASE NO. 05-1537

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WATSON COATINGS, INC.	**)**
	)
Plaintiff - Appellant.	**)**
	)
vs.	**)**
	)
AMERICAN EXPRESS TRAVEL	**)**
RELATED SERVICES COMPANY, INC.,	**)**
	)
Defendant - Appellee.	**)**

Appeal
From the U.S. District Court , Eastern District of Missouri
Honorable Charles A. Shaw, Judge

PLAINTIFF-APPELLANT'S BRIEF

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DISTRICT COURT JURISDICTION

The U.S. District Court, Eastern District of Missouri, Eastern Division had jurisdiction over the this case under 28 U.S.C. § 1332 (a)(1) and (c)(1).

The relevant facts establishing the jurisdiction of the District Court under § 1332 are that the matter in controversy exceeds the sum of seventy five-thousand dollars ($75,000.00) and the parties are citizens of different States. Plaintiff Watson Coatings, Inc. is seeking damages totaling $745,969.39. Plaintiff Watson Coatings, Inc. is a Missouri corporation with its principal place of business in the State of Missouri, and is therefore a citizen of the State of Missouri under 28 U.S.C. § 1332 (c)(1). Defendant American Express Travel Related Services Company, Inc. is a New York corporation with its principal place of business in the State of New York, and thus is a citizen of the State of New York under 28 U.S.C. § 1332 (c)(1).

JURISDICTION OF THE COURT OF APPEALS

The United States Court of Appeals, Eighth Circuit has jurisdiction over the matter of ***Watson Coatings, Inc. v. American Express Travel Related Services Company, Inc.***, Appeal No. 05-1537 under 28 U.S.C. § 1291.

Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction of appeals from all final decisions of the District Courts of the United States. On December 16, 2004, the Honorable Charles A. Shaw, United States District Judge, Eastern District of Missouri, Eastern Division entered an order in ***Watson Coatings, Inc. v. American Express Travel Related Services Company, Inc.***, Case No. 03CV01172, granting Defendant American Express Travel Related Services Company, Inc.'s Motion for Summary Judgment. Said order is a final order disposing of all of the claims of each party. On January 11, 2004, Plaintiff Watson Coatings, Inc. filed a Notice of Appeal to the United States Court of Appeals, Eighth Circuit. The Notice of Appeal filed by Plaintiff Watson Coatings, Inc. was filed in a timely manner, pursuant to 28 U.S.C. § 2107, in that the aforementioned Notice of Appeal

was filed within thirty days (30) of the entry of the final order by United States District Court, Eastern District of Missouri, Eastern Division.

STATEMENT OF ISSUES

Issue 1: Does a genuine issue of material fact exist as to whether Defendant/Appellee American Express Travel Related Services, Inc. ("AmEx") acted in bad faith by making a purposeful decision not to electronically screen and/or manually review checks written on corporate checking accounts and received in payment of personal accounts so as to detect fraud, such that the District Court erred in granting Summary Judgment to AmEx on the claim of Plaintiff/Appellant Watson Coatings, Inc. ("WCI") under § 469.270 R.S.Mo.?

Issue 2: Does a genuine issue of material fact exist as to whether AmEx had actual knowledge that checks written by Christine Mayfield and drawn on the corporate checking account of WCI were in payment of a personal debt, or were for the personal benefit of Ms. Mayfield such that the District Court erred in granting Summary Judgment to AmEx on WCI's claim under § 469.270 R.S.Mo.?

Issue 3: Does a genuine issue of material fact exist as to whether AmEx qualifies as a Holder In Due Course of checks made payable to

it which were drawn on the corporate checking account of WCI by its employee Christine Mayfield and used by her to pay the personal credit card charges made by her and her family members on her husband's AmEx account?

Issue 4: Whether Holder In Due Course status under § 400.3-302 R.S.Mo. (§3-302 of the U.C.C.) is properly an affirmative defense to claims of money had and received and unjust enrichment, so that if Holder in Due Course status is proven by AmEx that WCI's such claims of money had and received and unjust enrichment must be denied?

STATEMENT OF CASE

Nature of Case

This case is before the Court on appeal from an order issued by the Honorable Charles A. Shaw, United States District Judge, Eastern District of Missouri, Eastern Division granting summary judgment to Defendant/Appellee

American Express Travel Related Services Company, Inc. ("AmEx") on Plaintiff/Appellant Watson Coatings, Inc.'s claims ("WCI") for "money had and received", "unjust enrichment" and liability under § 469.270 R.S.Mo.[1] The case arises as a result of an embezzlement committed by WCI's former controller, Christine Mayfield[2]. She drew forty seven (47) checks, totaling $745, 969.39, on WCI's corporate checking account made payable to AmEx. Mayfield used these checks to pay the amount due on her husband's AmEx

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[1]The Uniform Fiduciaries Law was renumber from §§ 456.240 through 456.350 to §§ 469.240 through 469.350 R.S.Mo. by L.2004, H.B. 1511, § A. All references in Appellant's Brief to the UFL shall, for consistency, refer to the sections of the statute as renumbered.

[2]Ms. Mayfield plead guilty to mail fraud and was sentenced to thirty four (34) months in federal prison. (***United States v. Christine Mayfield***, Case No. 4:02CR00257)

account, on which she was an authorized signatory and on which she personally made hundreds of thousands of dollars in charges, none of which were for the benefit of WCI. WCI sued AmEx to recover the embezzled funds received by it.

Procedural History

On or about July 23, 2003, WCI filed a petition in the Circuit Court of the County of St. Louis, State of Missouri, seeking a judgment against AmEx on the theories of "money had and received" and "unjust enrichment". On or about August 22, 2003, AmEx had the case removed to the U.S. District Court, Eastern District of Missouri, Eastern Division. On August 27, 2003, WCI filed its First Amended Complaint (App. 8) adding a claim of "acceptance of funds paid in breach of fiduciary duty" pursuant to § 469.270 RSMo. (App. 10-11). AmEx filed its Answer and Affirmative Defenses on or about September 24, 2003 (App. 3 and 14). On September 13, 2004, AmEx filed its Rule 56 Motion for Summary Judgment, its Memorandum in Support, and its Statement of Uncontested Facts (App. 4, 25, and 29). On October 18, 2004, WCI filed its Statement of Material Facts, Memorandum in Opposition and its Response to AmEx's Statement of Uncontested Facts

(App. 5 and 129). On October 29, 2004, AmEx filed its Response to WCI's Statement of Uncontested Facts (App. 5 and 812).

On November 24, 2004, AmEx filed a Motion for Leave to Supplement the Record Pursuant to Rule 26 ("Motion for Leave to Supplement the Record") requesting that it be allowed to supplement the record to include a second affidavit of Paul Carey (App. 6). On November 30, 2004, the Honorable Charles A. Shaw, United States District Judge, Eastern District of Missouri, Eastern Division, granted AmEx's Motion for Leave to Supplement the Record, granted WCI's request to file a five (5) page sur-reply, and further ordered that AmEx would be allowed to file a five (5) page response to WCI's sur-reply (App. 6). On December 6, 2004, WCI filed its Sur-Response to Defendant's Supplementation to the Record on Defendant's Summary Judgment Motion (App. 6). On December 9, 2004, AmEx filed its Sur-Reply Memorandum of Law in Support of its Rule 56 Motion for Summary Judgment (App. 6).

On December 16, 2004, the Honorable Charles A. Shaw, United States District Judge, Eastern District of Missouri, Eastern Division, granted AmEx's

Motion for Summary Judgment (App. 827). On January 11, 2004, WCI filed its Notice of Appeal to this Court (App. 7 and 849).

STATEMENT OF FACTS

Christine Mayfield ("Mayfield") was employed as an accountant with WCI from October 14, 1992, through December 31, 1992, as the controller of WCI from January 1, 1993, through February 15, 2002, and also served as Treasurer of WCI from about November 2000 until January 2002 (App. 129, ¶ 2 and App. 812, ¶ 2). Mayfield's duties during her employment with WCI included, but were not limited to, bookkeeping and accounting functions, purchasing, payroll, accounts payable, billing and reconciling the corporate checking account (App. 129, ¶ 3 and App. 812, ¶ 3). In order to carry out her duties and responsibilities, Mayfield was given authority, acting as a fiduciary of WCI, to write checks drawn on funds in WCI's corporate checking account held with Cass Bank & Trust Company (App. 130, ¶ 4 and App. 812, ¶ 4).

During the period from August 1997 through October 2001, Mayfield manually wrote a total of forty-seven (47) checks on the corporate checking

account of WCI payable to AmEx for her or her husband's personal debt (App. 131, ¶ 13 and App. 815, ¶ 13). The total dollar value of these checks was $745,969.39 (App. 131, ¶ 13, and App. 815, ¶ 13). These checks were written to cover such charges as $12,242.48 for home improvements; $11,582.89 for electronics; $24,298.01 for automobile expenses; $85,358.02 for travel expenses; $12,445.00 for artwork; and $135,595.40 for jewelry (Add. 26, ¶ 4). Mayfield and her husband also charged $48,358.98 to pay for the tuition of Stephanie Robinson (Mayfield's daughter) at William Woods University as well as $26, 360.63 for their tax liabilities. (Add. 26-27, ¶ 5).

Mayfield wrote checks to AmEx ranging in amounts from $5,087.39 to $10,555.65 in 1998 (with an average monthly amount of $9,204.61) (Add. 27, ¶ 10). In 1999, the checks ranged from $10,141.57 to $30,006.11 (with an average monthly amount of $15,678.41) (Add. 27, ¶ 11). In 2000, the checks ranged from $6,431.63 to $37,389.21 (with an average monthly amount of $18,163.82) (Add. 27, ¶ 12). In 2001, the checks ranged from $18,799.82 to $38,938.87 (with an average monthly amount of $26,079.24) (Add. 27-28, ¶ 13).

At the top of each of these checks was printed the caption “Watson Coatings, Inc., P.O. Box 35067, St. Louis, Missouri 63135" (App. 132, ¶ 14 and App. 815, ¶ 14). Neither Mayfield’s name nor the name of her husband was printed on any of the checks (App. 132, ¶ 14 and App. 815, ¶ 14).

Mayfield was never authorized to write checks on the corporate checking account of WCI to pay her personal debt or the personal debt of her husband, John G. Mayfield. (Add. 32, ¶ 11). In particular, Mayfield was never authorized to write checks on the corporate checking account of WCI to AmEx to pay her personal debt or the personal debt of her husband (Add. 32, ¶ 11).

While she was embezzling funds from WCI, Mayfield took affirmative actions to hide her defalcations from the Watson family, the owners of WCI (App. 133, ¶ 23, App. 739-740, p. 61, ln 9 to p. 63, ln 13) including manipulation of the inventory at WCI to account for the missing funds (App. 133, ¶ 23, App. 739-740, p. 61, ln 9 to p. 63, ln 13).

As part of her duties, Mayfield was entrusted with reconciling WCI’s bank statements (App. 31, ¶ 16, App. 49, p. 41, ln 21 to p. 42, ln 1-22, and App. 804, ¶ 16). Upon receipt of the unopened bank statements, and in a

further effort to conceal her actions, Mayfield removed and destroyed the cancelled checks that she had written to either herself or her and/or her husband's personal creditors (such as AmEx) (App. 53-54, p. 60, ln 10 to p. 62, ln 6). No one at WCI, other than Mayfield, reviewed the bank statements or the cancelled checks during the time she was employed there (App. 31, ¶ 16 and App. 49, p. 42, ln 1-22). However, Carol Watson, one of the owners of WCI during the period of the embezzlement would review the list of payables to look for fictitious vendors (App. 41, p. 10, ln 14-20, App. 47-48, p. 36, ln 21 to p. 38, ln 5, and App. 63, p. 98, ln 4-8).

WCI's accounting system had been established by Scott Schreiner, a C.P.A., in or about 1989, during the time that he had been employed as WCI's controller (he held that position from 1989 through 1992) (App. 43, p. 17, ln 16 to p. 18, ln 11). Shreiner was then the son-in-law of Carol and Gordon Watson, then the owners of WCI (App. 43, p. 17, ln 16 to p.18, ln 2). While employed by WCI, Schreiner had similar job duties to those later assigned to Mayfield, including having primary responsibility for payables, preparation of checks for payment of vendors, and reconciling WCI's bank statement (App. 43, p. 18, ln 2 to p. 19, ln 7).

On November 20, 1992, WCI retained the services of Rubin, Brown, Gornstein & Co., LLP ("RBG"), certified public accountants licensed to practice accounting in the State of Missouri (Add. 33, ¶ 15). RBG agreed to perform its services in a proper, skillful, and careful manner as outside certified public accountants, in accordance with applicable professional standards, including the professional standards promulgated by the American Institute of Public Accountants (Add. 33, ¶ 17). Carol Watson believed that RBG was performing an annual audit and Gary Watson, an employee and board member of WCI when RBG was hired (and near the end of the period of embezzlement, the president of WCI), thought that RBG was reviewing WCI's internal controls to determine if there were any problems with its accounting procedures and controls (App. 60, p. 88, ln 7-12, App. 62, p. 95, ln 24 to p.96, ln 8, App. 130, ¶ 8, and Add. 33, ¶ 8). RBG reviewed WCI's financial statements annually, and prepared its state and federal corporate tax returns (Add. 33, ¶ 19). As a result of these activities, RBG was familiar with the accounting methods and controls employed by WCI (Add. 33, ¶ 19). Throughout the period of 1993 through 2001, RBG did

not communicate or advise WCI that its accounting methods or controls were unsatisfactory in any way (Add. 34, ¶ 20).

Initially, envelopes containing payments on accounts that are received by AmEx are sorted based on factors such as the thickness of the envelope, the size of the envelope, and whether the envelope contains any metal or plastic (Add. 24, ¶ 7). The 47 WCI checks that Mayfield sent to AmEx as payment for her husband's AmEx card account were oversized (as are almost all corporate checks) so that the checks would not fit into a regular AmEx return payment envelope without folding (Add. 24, ¶ 8 and 9). As the result of this, Mayfield would have had to either fold the checks or mail the checks to AmEx in a larger envelope (Add. 24, ¶ 8 and 9). In either event, the envelopes containing the WCI checks sent by Mayfield to AmEx would have been sorted out for manual extraction (Add. 24, ¶ 8 and 9). During the manual extraction process, an AmEx employee sits in front of a machine which opens each envelope to be processed (Add. 24, ¶ 10). The machine opens each respective envelope on two sides and uses suction cups to separate the envelope so that the contents of the envelope may be manually extracted (Add. 24, ¶ 10). After an envelope is manually opened, an

employee of AmEx manually removes the contents of the envelope and places the check and payment stub from said envelope into one of approximately 12 slots (Add. 24, ¶ 10 and 11). The payments sorted into each slot will be periodically picked up to be placed into a machine which processes each payment electronically (Add. 825, ¶ 13 and 14). Additionally, AmEx manually processes those checks that it receives without payment slips and on which the account number has not been written (App. 92, p.24, ln 1-8).

AmEx's electronic processing system is capable of reading both printed and handwritten information on checks (App. 134, ¶ 27, and App. 818, ¶27). The type of information read off of the checks received by AmEx by the electronic processing system is determined by what information AmEx has programmed the system to read (App. 104-105, p. 73 ln 4 to p. 74, ln 13). Currently, the portion of the checks that are read by this processing system include the ABA and transit routing number, which identifies the bank, as well as the dollar amount that is written on the check (App. 92, p. 22, ln 3-10). The system is capable of reading amounts and account numbers handwritten on the checks (App. 134, ¶ 27 and App. 818, ¶ 27). AmEx has

chosen not to program its system to read the printed name of the account holder on the check, even though it could do so (App. 105, p. 74, ln 4-13). AmEx has never discussed internally whether or not any additional review should be done when a corporate check is used to pay a personal account (App. 105, p. 75, ln 7-11). AmEx decided not to build any fraud detection into its electronic processing system (App. 96, p. 41, ln 7 to p. 42, ln 15). AmEx simply does not care about the source of funds used to pay down the balance owed on a card holder's AmEx account (App. 92, p. 23, ln 6-8, 95, p. 35, ln 22-24, 105, p. 74, ln 10-11). AmEx does not have any idea how many corporate checks it receives for payment of personal accounts, and thus has no idea how burdensome it would be for it to determine whether corporate checks that it receives in payment of charges made on personal accounts were properly authorized (App. 104, p. 72, ln 13-16).

That it is possible for a credit card company to detect embezzlement such as that engaged in by Mayfield is made clear by the affidavit of Jamie Lancaster, in which he states that Schneider Electric Company ("Schneider") detected an embezzlement by an employee because it received a telephone call from the audit department of a credit card issuer, Provident Bank,

inquiring as to whether a corporate check which it received for payment on a personal credit card account of a Schneider employee was properly authorized by Schneider (App. 136, ¶ 43, App. 137,¶ 44 and 45, App. 745, ¶ 1-5, and App. 746, ¶ 6 and 7).

AmEx is a corporation registered to do business in the State of Missouri and is not bank (App. 8, ¶ 2 and App. 14, ¶ 2).

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo, applying the same standard as the District Court: whether the record, viewed in a light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. ***Rabushka, ex rel. United States v. Crane Company***, 122 F.3d 559, 562 (8th Cir. 1997) (citing ***Earnest v. Courtney***, 64 F.3d 365, 366-367 (8th Cir. 1995). A genuine issue of material fact exists if the evidence is sufficient to allow a reasonable jury to return a verdict for the nonmoving party. ***Rabushka, ex rel. United States v. Crane Company***, 122 F.3d 559, 562 (8th Cir. 1997) (citing ***Anderson, ex rel. v. Liberty Lobby, Inc.***, 477 U.S. 242, 248, 106 S.Ct. 2502, 2510 (U.S. 1986).

SUMMARY OF ARGUMENTS

1) A genuine issue of material fact exists as to whether AmEx acted in bad faith (and thereby is liable under § 469.270 R.S.Mo.) when it took checks written by Mayfield as payment for her and her husband's personal debt which were drawn on WCI's corporate checking account. At all times relevant hereto, AmEx had the ability to ascertain manually and electronically that Mayfield was writing checks for her personal debt and/or her personal benefit from an account on which she was a fiduciary. However, AmEx intentionally refused to take any action which might have put it on notice of Mayfield's breach of fiduciary duty.

2) A genuine issue of material fact exists as to whether AmEx had actual knowledge that the checks written by Mayfield as payment for her and her husband's personal debt and drawn on WCI's corporate checking account were for Mayfield's personal debt and/or her personal benefit. Because Mayfield was, at all times relevant hereto a fiduciary on the account, if AmEx knew that the checks were being used to pay Mayfield's personal debt and/or were for her personal benefit then AmEx is liable under § 469.270 R.S.Mo.

3) A genuine issue of material fact exists as to whether AmEx failed to act in good faith (so that it would therefore not qualify as a "holder in due course") when it took checks written by Mayfield as payment for her and her husband's personal debt which were drawn on WCI's corporate checking account. At all times relevant hereto, AmEx had the ability to ascertain manually and electronically that Mayfield was writing checks for her personal debt and/or for her personal benefit from an account on which she was a fiduciary. However, AmEx intentionally chose not to take any action which would have put it on notice that Mayfield had breached her fiduciary to WCI by writing the checks to AmEx.

4) Under the law of the State of Missouri, AmEx's status as a "holder in due course" is not a proper affirmative defense to WCI's claims for money had and received and unjust enrichment. Common law causes of action, such as money had and received and unjust enrichment have not been displaced by the UCC, and thus status as a "holder in due course" is not an affirmative defense to these claims.

ARGUMENT

I. A genuine issue of material fact exists as to whether AmEx acted in bad faith by making a purposeful decision not to electronically screen and/or manually review checks written on corporate checking accounts and received in payment of personal accounts so as to detect evidence of fraud, and therefore the District Court erred in granting Summary Judgment to AmEx on WCI's claim under § 469.270 R.S.Mo.

Count II of Plaintiff's Complaint asserts a cause of action under § 5 of Missouri's Uniform Fiduciaries Law ("UFL"), codified as § 469.270 R.S.Mo. That section governs when a third party, such as AmEx, which receives and negotiates a check drawn by a fiduciary, such as Mayfield, on the account of her principal (here WCI) will be liable to the fiduciary's principal for the funds which it has received by negotiating the check.

§469.270 provides, in relevant part that:

> "If a check...is drawn by a fiduciary...in the name of his principle by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as a fiduciary unless

> he takes the instrument with actual knowledge of such breach or with knowledge of such facts that this action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of...a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument."

The District Court erred in granting AmEx's Summary Judgment Motion as to its claim under the first sentence of §469.270 because there exists a genuine issue of material fact as whether AmEx acted in bad faith in taking WCI checks sent to it by Mayfield in payment of Mr. Mayfield's AmEx account.

That Mayfield qualifies as a fiduciary of WCI is obvious. Section 469.204.1(2) defines "Fiduciary" to include an "...agent, officer of a corporation...or any other person acting in a fiduciary capacity for any person..." Mayfield was clearly an agent, and during a portion of the time during which she committed embezzlement was also an officer (treasurer), of WCI (App. 129, ¶ 1, App. 130, ¶ 4, App. 812, ¶ 1 and 4). During the entire period of her employment with WCI, Mayfield had signature authority on WCI's checking account on which she wrote checks to AmEx. By definition,

anyone with signature authority on a corporate checking account is a fiduciary. ***Mutual Service Cas. Ins. Co. v. Elizabeth State Bank***, 265 F.3d 601, 625 (7th Cir. 2001). ***Norristown-Penn Trust Co. v. Middleton***, 150 A. 885, 887 (Pa. 1930).

In addition, liability under the first sentence of §469.270 requires that the payee have actual knowledge that the fiduciary is breaching his/her fiduciary duty or that the payee acts in bad faith. ***Chouteau Auto Mart, Inc. v. First Bank of Missouri***, 55 S.W.3d 358, 360 (Mo. 2001). The Uniform Fiduciaries Act does not define "bad faith". ***Trenton Trust Company v. Western Surety Company***, 599 S.W.2d 481, 492 (Mo. 1980). The term "bad faith" is borrowed from the Uniform Negotiable Instruments Act. ***Trenton Trust Company v. Western Surety Company***, 599 S.W.2d 481, 492 (Mo. 1980) (citing ***Maryland Casualty Company***, 340 F.2d 550, 554 (4th Cir. 1965), ***Paine, et al. v. Sheridan Trust & Savings Bank***, 342 Ill. 342, 174 N.E. 368 (Ill. 1931), ***Ward v. City Trust Co. of New York***, 192 N.Y. 61, 84 N.E. 585 (N.Y. 1908)). The test of "bad faith" under the Uniform Negotiable Instruments Act has been said to be whether it is commercially unjustifiable for the person accepting a negotiable instrument to disregard

and refuse to learn facts readily available. ***Trenton Trust Company v. Western Surety Company***, 599 S.W.2d 481, 492 (Mo. 1980).

With regard to the WCI checks submitted by Mayfield, these checks would not fit in a regular AmEx return payment envelope without folding or placing said check in a larger envelope (Add. 24, ¶ 8 and 9). Thus, these checks would have been sorted out for manual extraction (Add. 24, ¶ 9). During the manual extraction process, an employee of AmEx sits in front of a machine which opens each envelope to be processed (Add. 24, ¶ 10). After each envelope is opened, the employee manually removes the contents of the envelope, reviews information on the check and/or deposit slip inside the envelope and places the check and payment stub from each envelope into one of approximately twelve (12) slots (Add. 24, ¶ 10 and 11). AmEx provided no evidence as to what specifically its employees who manually process payments look at to sort the payments into the twelve (12) different slots. Nor did AmEx provide any evidence as to the number of checks which it manually processes. It should be noted that AmEx did not even admit to manually processing check [other than those checks that it receives without payment slips and on which the account number has not

been written. (App. 92, p. 24, ln 1-8, 134, ¶ 28, and 818, ¶ 28)] until it filed the supplemental affidavit of Paul Carey, which was subsequent to the date on which WCI filed its responsive pleadings to AmEx's summary judgment motion, and well after the discovery cutoff deadline in this case. Prior to that, Mr. Carey had testified at his deposition (App. 92, p. 24, ln 1-8, App. 133-134, ¶25, 26, 27, and App. 818, ¶ 25, 26, and 27) that AmEx electronically processed all payments (unless no payment slips were included with the check and no account number was written on the check). Thus, WCI had no opportunity to inquire as to what AmEx employees looked at to determine into which of the twelve (12) slots any particular payment was to be placed. After the checks and payment slips are placed into one of the twelve (12) slots, the payments are electronically processed (Add. 24, ¶ 13 and 14).

Clearly, AmEx employees could read both the name of the payor written on the check, as well as the signature on the check and the name on the payment slip of manually opened payments. AmEx could easily rework the current system of manual review of oversized checks whereby all checks of that type (since almost all corporate checks are oversized it is logical to assume that most envelopes containing payments made with corporate

checks are manually opened) are manually reviewed to determine if said checks are written on a corporate checking account. Once it had been determined that a corporate check was used to make a payment on a personal account in the same name as that of the person who signed the check, AmEx could then contact the corporation to determine if any fraud or other improper activity was being perpetrated. AmEx would only have to make such a call to a corporation one (1) time and if it was told such payment was authorized, it would not have to make inquiry regarding future payments received by corporate checks on that account, as it could rely on the past course of dealings and could assume in the future that such payments were authorized. AmEx would have no duty to inquire as to any corporate check used to pay a personal AmEx account which was signed by a person other than a signatory on that account, as the UFL applies only to checks signed by a fiduciary to pay her personal debt or for her personal benefit.

With regard to AmEx's electronic processing system, what information is "read" by the system is entirely determined by AmEx. It is not as if AmEx bought some off the shelf piece of software to operate the system. Instead, the system is operated by software developed by AmEx employees. (App.

93, p. 29, ln 6-16). The system is extremely sophisticated, and can read both handwritten and printed information. (App. 105, p.74, ln 23-p. 75, ln 6). AmEx has not presented any evidence of the cost of programming its system to kick out corporate checks received by it in payment on personal accounts for further review. AmEx does not even know how many corporate checks it received in payment on personal accounts[3] (App. 104, p. 72, ln 13-16).

AmEx could program its system to "kick out" for hand review those checks written on a corporate checking account to pay down the balance on a personal AmEx account (as opposed to an AmEx corporate account, where it would be reasonable to assume that the charges would be paid on a corporate check). Clearly, the electronic processing system could be programmed to read words such as "Corporation", "Corp.", or "Inc." and to sort out these checks for further review. Such review, to satisfy AmEx's

[3] Given the ability of AmEx's electronic processing equipment to read handwritten information, it might even be possible to program the system to only kick out for human review those corporate checks that are signed by a cardholder.

obligations under the UFL, could follow the procedure outlined above for review of manually opened checks.

However, because AmEx does not care who it receives payment from (App. 92, p. 23, ln 6-8, App. 95, p. 35, ln 22-24, App. 105, p. 74, ln 10-11, and App. 135, ¶ 35), it has intentionally chosen not to program any fraud detection into its electronic processing system (App. 96, p. 41, ln 7 to p. 42, ln 15, App. 135, ¶ 37, and App. 820, ¶ 37), or to have its manual processors perform any review for potential fraud.

The fact that it is possible for a credit card company to review corporate checks received in payment of personal credit card accounts and to undertake investigation to determine whether they have been properly issued, is demonstrated by the affidavit of Jamie Lancaster, controller at Schneider Electric Company (Add. 29-30).

Here, AmEx's failure to either have its employees review corporate checks received in oversized envelopes which are opened manually and/or program its electronic processing system to read the printed name on checks, and to kick out corporate checks for human review, to identify

potential breaches of fiduciary duty, without even considering what the cost may be to do so, constitutes bad faith.

AmEx's bad faith is further demonstrated by its failure to make any inquiry regarding payments received on the Mayfields' account despite the large amount of the charges made by the Mayfields, which exceeded their annual income[4], and the large number of late payments received by AmEx on the account (to the point that Mr. Mayfield called AmEx on a number of occasions to advise it that a check to pay the balance was in the mail (App. 110, P. 94, ln 4 to App. 119, P. 132, ln 8). Despite this history, and the fact that either electronic images or microfilm copies of the checks used to make payment on the Mayfields' account were available to AmEx's customer service employees upon their request (App. 94, p. 32, ln 24, to p. 33, ln 23, and App. 121, p. 139, ln 3-21), no AmEx employee ever requested or looked at these copies. The reason for this is simple, AmEx did not want to discover that payments received by it, of which it retained a percentage, were

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[4] AmEx sets personal spending limits on Cardholder's based upon, among other factors, the resources available to the Cardholder. Given the information it had regarding the Mayfields' income, (App. 119, p. 132, ln 17 to App. 120 p. 134, ln 21) the large amount of the charges made each month by them should have sent up a red flag at AmEx.

unauthorized and improper. AmEx, much like an ostrich with its head in the sand, simply did not see that which it could have easily discovered had it merely looked (or programmed its system to look) at the evidence in its possession. At some point, obvious circumstances become so cogent that it is "bad faith" to remain passive. ***Continental Casualty Company, Inc. v. American National Bank and Trust Company of Chicago***, 329 Ill.App.3d 686, 703, 768 N.E.2d 352, 365, 263 Ill.Dec. 592, 605 (Ill.App. 1d. 2002) (citing ***Appley v. West*** , 832 F.2d 1021, 1031 (7th Cir. 1987). A bank [or credit card company] cannot avoid the directives of the Uniform Commercial Code and Uniform Fiduciaries Act by contending that it would be economically unfeasible to institute changes that would more closely scrutinize...transactions. ***Continental Casualty Company, Inc. v. American National Bank and Trust Company of Chicago***, 329 Ill.App.3d 686, 703, 768 N.E.2d 352, 366, 263 Ill.Dec. 592, 606 (Ill.App. 1d. 2002) (citing ***Master Chemical Corporation, et al. v. Inkrott***, 55 Ohio St.3d 23, 28, 563 N.E.2d 26 (Ohio 1990)).

The District Court here, in rejecting WCI's argument that AmEx was acting in bad faith, stated that:

> The mere failure to program a processing system to flag corporate checks that are routinely and without objection credited to personal accounts does not constitute bad faith. It is not clear to the Court that such a system is feasible, much less that AMEX would have a duty to implement it.

Add. 17. Whether a particular action constitutes bad faith, under Missouri law, is clearly a fact question, ***Ganaway v. Shelter Mut. Ins. Co.***, 795 S.W.2d 554 (Mo.App. 1990), as is whether a system to flag corporate checks is feasible. Contrary to the District Court's decision, Paul Carey, AmEx's own employee testified as noted above, that American Express could have programmed its electronic system to flag corporate checks. Further, this portion of the District Court's decision completely ignores the fact that virtually all corporate checks received in payment of personal accounts, by virtue of the checks being oversized, are opened manually, at which time they could have been reviewed for evidence of fraud. Finally, there was evidence that AmEx did not care from whom it received payment on a personal account. In other words, it did not care whether or not such payment was authorized. This evidence was sufficient evidence of bad faith that this issue should have been resolved not by the Court on summary judgment, but instead should have been submitted to the jury.

Because there is sufficient evidence of bad faith by AmEx as to constitute a genuine issue of material fact with regard to WCI's claim under the UFL, the District Court erred in granting AmEx's Motion for Summary Judgment.

II. A genuine issue of material fact exists as to whether AmEx had actual knowledge that checks written by Christine Mayfield and drawn on the corporate checking account of WCI were in payment of a personal debt and/or were for the personal benefit of Ms. Mayfield, so that the District Court erred in granting Summary Judgment to AmEx on WCI's claim under § 469.270 R.S.Mo.

Under the second sentence of § 469.270 R.S.Mo. a payee is liable to the principal for a fiduciary's breach, if either: (1) the check is payable to a personal creditor of the fiduciary and delivered to the creditor to pay or secure the fiduciary's personal debt to the actual knowledge of the creditor, or (2) the check is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary. ***Chouteau Auto Mart, Inc. v. First Bank of Missouri***, 55 S.W.3d 358, 360 (Mo. 2001).

The court in ***Chouteau Auto Mart, Inc. v. First Bank of Missouri*** did not explicitly address the level of personal knowledge necessary to create liability under the second sentence of § 469.270 R.S.Mo. Instructive in this regard is the case of ***County of Macon v. Edgecomb***, 654 N.E.2d 598 (Ill.App. 4d. 1995), decided under § 5 of Illinois' UFL, 760 ILCS 65/4 (2004), the operative language of which is identical fo § 469.270 R.S.Mo. In that case the county sued two banks to recover amounts embezzled by its former treasurer, who had caused checks to be issued by the county for his personal benefit. Three (3) of the checks had been used to make payments on personal loans which Edgecomb had received from Magna Bank, on which it was named as payee. The Court held that:

> If the Magna employee taking the checks for payment knew that the loans on which the checks were applied were personal loans (citations omitted), then Magna is liable 'if the fiduciary in fact committed a breach of his obligation as fiduciary in drawing or delivering the instrument' (citation omitted). It is not necessary, under section 5 of the Act, to allege that Magna had actual knowledge of the breach of fiduciary duty or bad faith. Count XVII accordingly states a good cause of action against Magna as to these checks. ***Id.*** at 440.

Here, there can be no doubt that AmEx knew that the payments received on WCI checks were for Mayfield's debt and/or for her personal

benefit (see argument below). This, alone, is sufficient to establish liability under § 469.270 R.S.Mo. This conclusion is bolstered by an additional holding of the Court in ***County of Macon***, wherein it held that the bank had no liability under the UFL for a cashier's check received by it from Edgecomb, absent actual knowledge that the use of the check constituted a breach of fiduciary obligation, or bad faith, in that the cashier's check was not drawn by a fiduciary, as such, or in the name of his principal. ***Id.*** at 441.

The Comments to §§ 4, 5 and 6 of the Uniform Fiduciaries Act, Vol. 7, Uniform Laws Annotated (2002), support the interpretation of §5 advanced by the Court in ***County of Macon***. The Commissioners there stated that:

> Sections 4-6 cover two situations requiring different rules:
>
> 1. Where the instrument is not given in a transaction known by the taker to be for the personal benefit of the fiduciary.
>
> Here the taker should not be bound to make inquiry....
>
> 2. Where the instrument is given in a transaction known to be for the personal benefit of the fiduciary a distinction is made between
>
> (1) Cases where an instrument payable to the principal or to the fiduciary as such, is indorsed and transferred in payment of or as security for a personal debt of the fiduciary (Section 4), and also

> (2) Cases where an instrument is drawn or made by the fiduciary on behalf of the principal or is drawn by the fiduciary as such, and payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary (Section 5) on the one hand; and
>
> (3) Cases where an instrument is drawn by the fiduciary on behalf of the principal or by the fiduciary as such, payable to the fiduciary personally and indorsed by him to his personal creditor. (Section 6.)
>
> In cases (1) and (2) there is a strong presumption that the fiduciary is acting improperly. In (3) however it may very well be that the fiduciary was entitled to receive payment out of his principal's funds, as where the principal is indebted to him for salary, commissions, reimbursements for expenses, dividends, or the like. It is therefore provided in case (3) that the creditor should not be liable unless he has actual knowledge that the fiduciary was acting improperly, or acts in bad faith. But in (1) and (2) the holder is liable unless the fiduciary was in fact acting properly. This distinction is drawn in the Massachusetts cases cited in 34 Harvard Law Review 454, note 26.

In other words, when a payee receives a check drawn by a person, on an account for which that person is a fiduciary, to pay for her personal debt, or for her personal benefit, the payee should be on its guard, and make inquiry, because such checks give notice, on their face, of potential irregularities.

In its decision, the District Court stated that:

> AmEx did not manually process the checks, and therefore had no opportunity to know that the checks were drawn by a fiduciary...In addition, the checks were for payment on John Mayfield's account not Mayfield's personal account.

First, the Court is wrong when it said that AmEx did not manually process the checks. In his supplemental affidavit here, Paul Carey admitted that the checks drawn on WCI's account that Mayfield used to pay the Mayfield's AmEx account were manually opened, and were thereafter separated into one of twelve separate slots. As noted above, there was sufficient manual processing that AmEx could have determined that Mayfield had made payment from an account on which she was a fiduciary (i.e., an authorized signatory) to pay her personal account. Had AmEx bothered to look at the check, the very fact that the last name of the signatory was identical to the last name on the AmEx account would have given rise to a duty to make inquiry under the UFL. Further, it was not necessary that AmEx even know that Mayfield was a fiduciary on the account, only that the payment was being made for her personal debt or personal benefit, **See *County of Macon, supra***. There is overwhelmingly substantial evidence that AmEx did

know the payments in question here were for Mayfield's own debt or for her personal benefit.

During the period from August, 1997 through October, 2001, Mayfield manually wrote a total of forty-seven (47) checks to AmEx on the WCI account for charges made by her and her husband (substantially more were made by her (App. 193-573) on her husband's AmEx account. (App. 131, ¶ 13 and App. 815, ¶ 13). The total dollar value of those checks is $745,969.39 (App. 131, ¶ 13 and App. 815, ¶ 13). During the period of August 1997 through October 2001, Mayfield and her husband charged $12,242.48 on their AmEx account for home improvements, $11,582.89 for electronics, $24,298.01 for automobile expenses, $85,358.02 for travel expenses, $12,445.00 for purchases of artwork, and $135,595.40 for purchases of jewelry (Add. 26, ¶ 4). During the period of August 1997 through October 2001, Mayfield and her husband charged $48,358.98 on their AmEx account to pay for the tuition of Stephanie Robinson (Ms. Mayfield's daughter) at William Woods University as well as $26,360.63 for their tax liabilities (Add. 26, ¶ 5). Clearly the expenses incurred by Mayfield were for her benefit and the benefit of her family. Further, the nature and

amount of the charges made by Mayfield was information available from AmEx's own computer system (App. 93, p. 28, l. 4-24)

Additionally, even though Christine Mayfield did not open the original account with AmEx, once she became a cardmember she faced liability for non-payment of her charges. As stated in paragraph 7 of the "Agreement Between Cardmember and American Express Travel Related Services Company, Inc. "[AmEx] may at [its] discretion pursue Additional Cardmembers for payment of their own charges if you [John Mayfield] fail to pay those charges" (App. 747, ¶ 7, 763, ¶ 7, and 776, ¶ 6). Thus, to the extent that the payments to AmEx made by checks drawn on WCI's account were in payment of charges made by Mayfield, these payments were for Mayfield's personal debt.

AmEx, by crediting the payments made by Christine Mayfield to John Mayfield's account, on which she made substantial, obviously personal charges, and for which she was personally liable if timely payment was not received on the account, must be charged with actual knowledge that the funds were received by it in payment of a debt of Mayfield, or in a transaction which was for her benefit. This, alone, is sufficient to establish AmEx's liability under the second sentence of § 469.270 R.S.Mo. and as such a

genuine issue of material fact exists as to Count III of Plaintiff's Complaint. Therefore, the District Court erred in granting AmEx's Motion for Summary Judgment.

III. A genuine issue of material fact exists as to whether AmEx qualifies as a Holder In Due Course of checks it received drawn on the corporate checking account of WCI by its employee Christine Mayfield to pay the personal credit card charges made by her and her family members on her husband's American Express account.

AmEx was designated as the payee on the checks drawn by Christine Mayfield on WCI's checking account as payment of her personal debt and the debt of her husband (App. 131, ¶ 13 and App. 815, ¶ 13). The holder in due course rule generally applies to third party transferees of the check, not to the payee. The drafters of the UCC did not categorically exclude a payee from holder in due course status, but cautioned that the payee of an instrument can be a holder in due course, only in the rare case when a third party intervenes in the transaction. ***Dalton & Marberry, P.C. v. NationsBank, N.A.***, 982 S.W.2d 231, 235 (Mo. 1998.) citing Comments, section 400.3-302, RSMo. 1994. Although it is appropriate in a few

instances to allow the payee of an instrument to assert rights as a holder in due course, in the typical case the holder in due course is not the payee of the instrument. ***Id.*** Rather the holder in due course is an immediate or remote transferee of the payee. ***Id.*** Furthermore, a payee who takes an instrument directly from the drawer's agent rarely becomes a holder in due course because such a payee will usually have notice of claims and defenses by virtue of the fact that he has dealt directly with the maker. ***Id.*** citing **C.J.S., Bills and Notes**, vol. 10, section 184, p. 344 (1996).

§ 400.3-302(a) R.S.Mo. states that:

"Holder in due course" means the holder of an instrument if:

(1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains unauthorized signatures or has been altered, (v) without notice of any claim to the instrument described in Section 400.3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 400.3-305(a).

There is substantial evidence that AmEx did not act in good faith in taking and negotiating the WCI checks that it received for payment of the Mayfield

account in that AmEx intentionally refused to examine corporate checks used to pay personal accounts to determine whether such use was fraudulent (see Section I. of the Argument Section of this brief, above). While the District Court might have been correct in stating that the issuance of corporate checks to pay personal credit accounts is not irregular, a duty to inquire arises where the signatory on the check has the same last name as the account holder. AmEx's affirmative decision not to make any such inquiry presents a genuine issue of material fact as to whether AmEx acted in good faith, and therefore qualifies as a holder in due course. Therefore, the District Court erred in granting AmEx's Motion for Summary Judgment as to WCI's claims of money had and received and unjust enrichment**.**

IV. Holder In Due Course status under § 400.3-302 R.S.Mo. (§3-302 of the U.C.C.) is not properly an affirmative defense to claims of money had and received and unjust enrichment.

A holder in due course within the meaning of the Uniform Commercial Code ("UCC") is defined in § 400.3-302(a). Section 400.1-102 R.S.Mo. provides, in relevant part, that: "Unless displaced by the particular provisions of this chapter, the principles of law and equity, including...the law relative

to...principal and agent, estoppel, fraud...or other validating or invalidating cause shall supplement its provisions."

In ***Choteau Auto Mart v. First Bank of Missouri*** , 148 S.W.3d 17, 24 (Mo.App. W.D. 2004), the Court stated that it was "...not certain whether the UFL and UCC have totally supplanted the common law claims against banks involving a breach of fiduciary duty or whether those laws are seen only to supplement or modify the common law causes of action." It specifically noted that in ***Dalton & Marberry, P.C. v. Nationsbank, N.A.***, 982 S.W.2d 231 (Mo.banc 1998) the Missouri Supreme Court had upheld a judgment against a bank arising from a bookkeeper's embezzlement of funds from her employer, based entirely on common law principles, without reference to the UFL. Ultimately, the Court in ***Choteau*** held it did not have to resolve this issue.

In ***Penalosa Co-op. Exchange v. A.S. Polonyi Co.***, 745 F.Supp. 580 (W.D.Mo.1990) the Court held that the Complaint filed therein sufficiently stated causes of action under both the UFL and for money had and received. Given this decision, and the reliance by the Missouri Supreme Court on common law principles in ***Dalton & Marberry***, it must be concluded that under Missouri law the common law causes of action have not been

displaced by either the UCC or the UFL. Therefore, the holder in due course rule, set forth in the UCC, is not properly an affirmative defense to claims of money had and received and unjust enrichment, and the District Court erred in granting summary judgment on Counts I and II of WCI's Complaint based upon its finding that AmEx was a holder in due course of the forty-seven (47) checks drawn by Mayfield on WCI's account.

CONCLUSION

For all of the foregoing reasons, the Court should grant WCI's Appeal and reverse the Order entered by the Honorable Charles A. Shaw, United States District Judge, Eastern District of Missouri, and remand the action with instructions to enter an Order denying Defendant/Appellee American Express Travel Related Services, Company, Inc.'s Rule 56 Motion for Summary Judgment.

Respectfully submitted,

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